No. 13,545

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. W. MEYER, LIMITED,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF FOR APPELLEE

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JURISDICTIONAL STATEMENT

This is an appeal pursuant to section 1293 of the Judicial Code, noticed on June 25, 1952 (R. 4), appealing from a judgment of the Supreme Court of Hawaii entered June 23, 1952 (R. 57). The case is one of boundary dispute, involving only local law. Therefore jurisdiction is dependent upon the amount in controversy.[1]

[1] 28 U.S.C. 1293; *Sociedad Espanola v. Buscaglia,* 164 F. 2d 745 (C.A. 1st 1947), cert. den. 333 U.S. 867, 68 S.Ct. 790, 92 L.Ed. 1145; *De la Torre v. National City Bank,* 110 F. 2d 381 (C.A. 1st 1939); *Robert Hind Ltd. v. Silva,* 75 F. 2d 74 (C.A. 9th 1935).

Appellant's "Statement of Jurisdiction" (R. 4) is not an affidavit and may not be considered.[2] Pleaded amounts of value and damages, cited by appellant (Br. 1-2), are from the appellant's second cause of action which by stipulation (R. 60, 30) was not tried, has not been before the Supreme Court, and is not before this court. Alleged in the first cause of action was the value assessed for taxation (R. 17), but appellee denied that the assessment included the area here in dispute, the same being government property (R. 25), and in any event the alleged assessed value was only $1,268.

What does appear in the record is that the Territory, the appellee, has made extensive improvements in the area now claimed by appellant and here in dispute, commencing in 1924 with a value not shown (R. 381), and continuing in 1933 with a $250,000 project (R. 392-394). These improvements comprise a water system; the location of the intake of the water tunnel on the area in dispute appears upon comparison of the maps appended to the respective pleadings.

That the value in controversy in fact exceeds $5,000 is not contested by appellee, but since jurisdiction cannot be conferred by consent the question is whether the record is sufficient. The record is unaided by the order of the Supreme Court allowing the appeal[3] (not printed), since such an order now is surplusage.[4] Appellant has the burden of sustaining this Court's jurisdiction.[5]

As to the jurisdiction below, the same appears as follows: The case is one which arose on an application of the appellant in the Land Court of the Territory filed pursuant to

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[2] 28 U.S.C. 2108 and cases cited supra, note 1.
[3] Cf. *Ihihi v. Kahaulelio,* 263 Fed. 817 (C.A. 9th 1920).
[4] *Fong v. James W. Glover, Ltd.,* 197 F. 2d 710 (C.A. 9th 1952).
[5] *De la Torre v. National City Bank,* supra.

sections 12600 and 12625 of chapter 307, Revised Laws of Hawaii 1945, relating to registration of title under the Torrens System, and amended pursuant to Act 207 of the Session Laws of Hawaii 1947, printed in the note.[6] To the amended application (R. 14-18), the Territory pleaded (R. 18-26). After decision by the Land Court a decree of that court was entered on April 10, 1950 (R. 35-38) and the case was taken to the Supreme Court of Hawaii by the Territory, appellee here, by a writ of error (R. 13-14) issued on July 7, 1950, hence within the required ninety days, pursuant to sections 9551 and 12635, Revised Laws of Hawaii 1945. From the judgment of the Supreme Court in favor of the Territory the case comes here. The opinion below is reported.[7]

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[6] "ACT 207

"An Act to Authorize Litigation for the Determination of the Boundaries of Royal Patents Nos. 3437 and 3539, Kahanui 2 in the Island of Molokai and Claims for Rentals for the same.

"BE IT ENACTED BY THE LEGISLATURE OF THE TERRITORY OF HAWAII:

"Section 1. The land court of the Territory of Hawaii shall, subject to review by the supreme court as provided by law, have jurisdiction to hear and determine an application for land registration brought by any person claiming title or an interest in Land Patent Grant Nos. 3437 and 3539, against the Territory of Hawaii and others, and to determine therein the true boundaries of said land patents.

"Section 2. If such proceeding has been or shall be brought in the land court not later than two years after this Act becomes effective, there may be included therein claims for rental for occupancy of any portion of the said lands by the Territory or its agencies, and the court may award judgment for such rentals, and determine the person or persons entitled thereto, if it be found that the Territory or its agencies has been occupying such portion without right, without regard to any limitation of time for commencing action against the Territory otherwise imposed by statute, but no interest shall be allowed on such claim up to the time of rendition of judgment.

"Section 3. This Act shall take effect upon its approval."

[7] 39 Haw. 403.

STATEMENT OF THE CASE

Appellant filed its amended application in the Land Court for land designated as "all of Grant 3437 to R. W. Meyer, and Grant 3539 to R. W. Meyer on a portion of Grant 3437 to R. W. Meyer." (R. 15). Actually, and as held by the Supreme Court of Hawaii (R. 40, 46-47), these were two separate grants to appellant's predecessor in title, the first of which did not include the second. The relation of the two grants to each other is clear upon their face (Exs. B and K). Grant 3539, the second of the two grants, is for a ridge jutting out from the northern boundary of the first grant and touching it only at the base of the ridge. The descriptions and maps contained in the two patents (Exs. B and K) are reproduced at page I of the appendix, with a red line superimposed on each to show appellant's claim. (This part of the appendix hereinafter is referred to as Map I.)

The Territory's answer denied that Grant 3437 included the piece conveyed by Grant 3539, and described the two pieces separately (R. 21-24). This answer set the northern boundary of Grant 3437, between the western end of it and the base of the ridge, on a line southerly of appellant's claim and in accordance with the patent map. Thus there was placed in dispute a fifty acre area which the Territory says, and the Supreme Court held, never was granted by the government and still belongs to it. The fifty-acre area, called the "disputed area," is colored in green on the map appended to the Territory's answer which is reproduced at page II of the appendix, hereinafter referred to as Map II. On Map I the disputed area appears as the three-sided area between the superimposed red line, the ridge, and the

northern boundary shown by the patent. (As to the ridge, reference is made to that portion of the cited map which reproduces Grant 3539, the later patent which granted the ridge. Grant 3437 did not grant and did not depict the ridge.)

As will appear, there is no middle ground between the appellant's line and the Territory's. Appellant does not say that there is, but seeks to sustain a right to cross over to the ridge, from west to east, along the red line (again referring to Map I).

The basis of appellant's claim is, as it was in the trial court, that this line should be fixed by parol testimony as to the ancient boundary. The basis of appellee's case is that the line should be fixed according to the survey description and map of the government surveyor Monsarrat incorporated in the patent. The trial court's primary error was in holding that the government survey, even though incorporated in the patent, constituted only an inconclusive opinion as to where the line should be (R. 29-31). From this primary error other errors followed, and the trial court decided that the appellant was the owner of the disputed area except as to a certain undivided interest not here involved (R. 34).

The Supreme Court reversed, holding the patent (Grant 3437 under which the disputed area is claimed) clear, certain and unambiguous, requiring a location which excludes the disputed area (R. 45-50, 52, 55-56). Accordingly, the Supreme Court ordered the disputed area excluded from the land court registration (R. 57). The evidence on which the trial court based its decision was extraneous and inadmissible, the Supreme Court held (R. 43-44, 48, 54-56).

The line of Grant 3437, now in dispute, consistently and

continuously has been placed by the government where it is placed by it today. This is stated because appellant seeks to inject an aura of uncertainty of the government's line by insinuating that it was not claimed until 1929 (Br. 10-11). The insinuation is entirely without basis. To the contrary, all maps, records, and official dealings between the government and the Meyer family, were on the basis of a boundary line placed where the government places it today, and it was not until after the government had constructed its water tunnel and intake in 1924 (R. 381-384) and made its further $250,000 of improvements in 1933 (R. 392-394) that the Meyer family claimed the intake site by the suit tried in 1936. (This was the trial at which was taken the testimony of witnesses now deceased, read from the record of that trial into the present record, R. 379-410.) The earlier suit resulted in a judgment sustaining the government's boundary line and the Meyer family took the case to the Supreme Court of Hawaii which held, precisely because the government always had claimed the disputed land, that the trial court lacked jurisdiction.[8]

Hence ensued the present suit, which was brought by the Meyer family, now occupying corporate status (see Abstract), in the Land Court of the Territory and with specific consent of the Territory to be sued (Act 207, Session Laws of Hawaii 1947, note 6).

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[8] *Meyer v. Territory*, 36 Haw. 75, 77, 1942.

QUESTION INVOLVED

The question involved is:

Did the Supreme Court of Hawaii commit reversible error by holding that the grant is clear, certain and unambiguous, requiring a location which excludes the disputed area?

This question is to be judged in the light of two well-settled principles:

First: The case involves solely issues of local law. It is a boundary dispute, in which the Supreme Court of Hawaii has held that the line of a public land patent issued under Hawaiian laws, is to be fixed according to the survey description and map of government surveyor Monsarrat incorporated in the patent, and not according to parol testimony as to the ancient boundary of the land. The Supreme Court has reviewed the record, has found in it no factual issue that is not concluded by the Court's rulings of law, and has ordered the Land Court to dispose of the case accordingly. The case is a typical one for the application of the well-settled principle that in matters of local concern,[9] including land matters,[10] and the meaning and effect of local statutes and local procedure,[11] there is to be no reversal of the

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[9] *Waialua Agricultural Co. v. Christian,* 305 U.S. 91, 108-109, 59 S.Ct. 21, 83 L.Ed. 60; *De Mello v. Fong,* 164 F. 2d 232 (C.A. 9th 1947).

[10] *Kapiolani Estate v. Atcherley,* 238 U.S. 119, 35 S.Ct. 832, 59 L.Ed. 1229; *Lewers and Cooke v. Atcherley,* 222 U.S. 285, 32 S.Ct. 94, 56 L.Ed. 202; *Territory v. Hutchison Sugar Co.,* 272 Fed. 856, 859 (C.A. 9th 1921); *Pioneer Mill Co. v. Victoria Ward Ltd.,* 158 F. 2d 122 (C.A. 9th 1946).

[11] *De Castro v. Board of Commissioners,* 322 U.S. 451, 459, 64 S.Ct. 1121, 88 L.Ed. 1384; *Lord v. Territory,* 79 F. 2d 761 (C.A. 9th 1935); *Carey v. Hilo Finance and Thrift Co.,* 170 F. 2d 236 (C.A. 9th 1948); *Meyer v. Territory,* 164 F. 2d 845 (C.A. 9th 1947), cert. den. 333 U.S. 860, 68 S.Ct. 738, 739, 92 L.Ed. 1139, 1140.

Supreme Court of Hawaii except for "manifest" error, that is, "clear departure from ordinary legal principles."

Second: Appellant's brief contains no specification of errors, as required by Rule 20, paragraph 2 (d). Instead appellant relies on ten point headings, copied from its "statement of points" filed pursuant to Rule 19, paragraph 6. These points really are summaries of argument. Further, appellant's statement of the questions involved does not show, as required by Rule 20, paragraph 2 (c), wherein the questions stated by it are raised on the record but instead states wherein they have been raised by itself in its "statement of points." There are hiatuses between the two, leaving much that is not tied to record citations that show appellant's right to raise the points. For example, appellant here is trying to impeach as of unknown origin (Br. Point 5, p. 41) the map which appears on the face of Grant 3437, despite the fact and without revealing, that the trial court found (R. 31) that the plat in the patent was Monsarrat's and that the parent map work and field notes were Monsarrat's, with which the Supreme Court simply agreed (R. 45). Specifications and arguments merit no consideration when not based on the record.[12] Appellant's brief is replete with this fault. In view of the first principle above stated, which requires appellant to show manifest error and clear departure from legal principles by the Supreme Court, this Court would be justified in dismissing the appeal or summarily affirming the Supreme Court.

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[12] *Utley v. United States,* 115 F. 2d 117 (C.A. 9th 1940); *Simons v. Davidson Brick Co.,* 106 F. 2d 518, 521 (C.A. 9th 1939); *Buell v. Simon Newman Co.,* 154 F. 2d 35 (C.A. 9th 1946); *White v. Quittner,* 194 F. 2d 703 (C.A. 9th 1952).

ARGUMENT

THE SUPREME COURT WAS CORRECT IN ITS HOLDING THAT THE GRANT IS CLEAR, CERTAIN AND UNAMBIGUOUS, REQUIRING A LOCATION WHICH EXCLUDES THE DISPUTED AREA.

1. Historical background.

The history of Hawaiian land titles commences with the Land Commission, which was created by the Laws of 1846, p. 107, and dissolved as of March 1, 1855 by the Laws of 1854, p. 21. By the "Great Mahele" of 1848[13] a division of lands was made between Kamehameha and his chiefs, without survey.[14] An award of the Land Commission nevertheless was required to be secured in order to obtain the title for which the Mahele paved the way,[15] and it further was required that a royal patent be obtained on the land commission award. Lands that were unawarded by the Land Commission remained in the government,[16] subject to certain special acts not here involved. It was by virtue of such failure to secure an award that the government came into ownership of the "lele"[17] of Kahanui on the island of Molokai. Besides the lele, involved in this case, there is another Kahanui north and west of it. (Ex. A; Map II.)

The foregoing is merely background. This case involves Grant 3437, issued by the government after a sale at public auction, as will appear. The prior history of the land appears only by certain references thereto in correspondence.

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[13] Explained in *Harris v. Carter,* 6 Haw. 195, 1877.

[14] *In the Matter of the Boundaries of Pulehunui,* 4 Haw. 239, 1879.

[15] *Kanaina v. Long,* 3 Haw. 332, 335, 1872.

[16] *Kenoa v. Meek,* 6 Haw. 63, 67, 1871; *Kahoomana v. Moehonua,* 3 Haw. 635, 1875; *Thurston v. Bishop,* 7 Haw. 421, 1888.

[17] "Lele" meaning literally "to jump" (Andrews Hawaiian Dictionary). Hence a non-contiguous piece of land held with a larger tract. See *In re Kakaako,* 30 Haw. 666, 668, 1928.

2. Land laws; requirement of survey; sale of this land by survey; trial court's error in this regard.

Two distinct methods of obtaining title are to be borne in mind, the first, by land commission award and patent issued in confirmation of the award, and the second, by a sale by the government in conformity with the land laws.

As to the first, it originally was possible to obtain a patent on a land commission award, without survey, according to the ancient boundaries. These boundaries were determined from the testimony of "kamaainas," who according to the Hawaiian custom from prehistoric times had knowledge of the boundaries, which was taught from father to son.[18] Concern was felt over the preservation of the kamaaina testimony;[19] indeed in the case cited in note 18, decided in 1879, some of the witnesses testified that "we are the only surviving kamaainas."[20] To put a stop to the practice of relying on the ancient boundaries there had been enacted in 1868 a law forbidding the issuance of "any patent, * * * in confirmation of an award by name * * *, without the boundaries being defined in such patent * * *."[21]

As to lands sold by the Minister of the Interior, the Laws of 1851[22] required them "to be correctly surveyed." This provision became section 47 of the Civil Code of 1859, so set forth in the Compiled Laws of 1884. The previous section, section 46, provided for the appointment by the Minister of the Interior of "suitable agents throughout the kingdom,

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[18] *In the Matter of the Boundaries of Pulehunui,* supra, 4 Haw. 239 at pp. 240-241.

[19] *Akeni v. Wong Ka Mau,* 5 Haw. 91, 93, 1883.

[20] *In the Matter of the Boundaries of Pulehunui,* supra, 4 Haw. 239 at p. 245.

[21] Laws of 1868, p. 30, sec. 10.

[22] Laws of 1851, p. 52, sec. 4.

for the management and sale of government lands" and section 47 continued:

> "SECTION 47. Every such agent shall procure the lands sold by him to be correctly surveyed; * * *."

By section 45 it further was provided:

> "SECTION 45. It shall be the duty of the Minister of the Interior to cause such surveys, maps, and plans of the government lands, harbors, and internal improvements to be made as the public interests may require; which surveys, maps and plans shall be kept in his office for public inspection and reference."

The other pertinent laws are set forth in the appendix of appellant's brief and here are summarized. They provided[23] that:

> The Minister of the Interior "shall have power to lease, sell, or otherwise dispose of the public lands, and other property, * * * subject, however, to such restrictions as may, from time to time, be expressly provided by law."
>
> "All sales or leases of government lands shall be made at public auction, after not less than thirty days' notice by advertisement * * *, excepting lands and portions of lands of less than three hundred dollars in value."
>
> "Notice of sale hereinabove required to be made, shall contain a full description of the land to be sold, as to locality, area, and quality, with a reference to the survey, which shall in all cases be kept in the office of the Minister open to inspection of anyone who may desire to examine the case."
>
> "A Royal Patent, signed by the King, and countersigned by the Kuhina Nui and the Minister of the Interior, shall issue under the great Seal of the kingdom

[23] Civil Code 1859, sections 42-47, as amended by the Laws of 1876, Chapter XLIV, and the Laws of 1878, Chapter V, set forth in the Compiled Laws of 1884, pp. 11-13.

to the purchaser in fee simple of any government land or other real estate; * * *."

"All Royal Patents, leases, grants or other conveyances of any Government land or real estate, shall be prepared by and issued from, the Department of the Interior; and it shall be the duty of the Minister of the Interior to keep a full and faithful record of all such patents, leases, grants, and other conveyances."

It thus appears that, as correctly held by the Supreme Court (R. 44-45), the sale here involved was, and was required to be, by survey. The sale was open to the public, and all members of the public were entitled to an equal opportunity "to examine the case" on the basis of the public records. Testimony as to where the line anciently was can play no part in such a sale, the only question being where the survey has placed it.[24] Accordingly, the Supreme Court correctly held (R. 43-44, 48, 54-56) that the trial court erred in admitting "parol or extrinsic evidence of ancient boundaries on the theory that Royal Patent Number 3437, as well as the other patent, constituted a grant 'by name only'" (R. 43), and erred when "on that evidence, it in effect interpreted the language of the call to mean a portion of boundary 'as known and used from ancient times.'" (R. 43).

That the Supreme Court correctly typified the trial court's decision sufficiently appears from the following portions of it:

That the work of Monsarrat, the government surveyor who made the survey, "must still be entitled to and be weighed as other testimony of surveyors and engineers in any particular given case" (R. 29).

That "an award by name only conveys all property within its boundaries as known and used from ancient times" (R. 31).

[24] Infra, pp. 37-41.

That at the auction "the whole of the lele of Kahanui" was "purchased by name" (R. 32).

That it was the intention of the grant "to vest in the original grantee R. W. Meyer all of the land or lele of Kahanui; which would include the question of boundary * * *" (R. 33-34).

Appellant in its brief denies that the basis of the trial court's decision was a finding of intent to convey according to ancient boundaries (Br. 60), but nevertheless in its effort to uphold the trial court's decision gravitates to this theory again and again (Br. 11-14, 46, 55-56, 60-61, 69, 74-77).

3. Monsarrat's survey; sale of the land; issuance of the patents.

It being the duty of the Minister of Interior to have the government lands surveyed and mapped, M. D. Monsarrat, government surveyor, in 1885 was on the island of Molokai making such surveys. (Exs. 6 and 7). Monsarrat's reputation as a surveyor was excellent (R. 391).

On July 17, 1885 Monsarrat wrote Alexander[25] that "yesterday the Kamaainas showed me a piece of Kahanui away mauka on the edge of the palis * * *." (Ex. 7-A). Monsarrat went on to say in a subsequent letter that the piece had been left out of the Land Commission award (Ex. 7-B).

Monsarrat made field notes of his surveys and there are in evidence pages from his Field Book 2 of this period (Ex. 16). Thereafter Monsarrat mapped this land, making four maps dated 1886 (Exs. 11-14, R. 228-233), and wrote a description dated September 7, 1886 (see Grant 3437 file, Exs.

[25] Alexander was the Surveyor General.

C-1 to C-3).[26] This description appears in the patent, but with minor corrections, mostly in spelling (infra pp. 17-18). From Monsarrat's map was made the sketch map appearing as a part of the patent on its face. The Supreme Court so stated (R. 45-46). The trial court had so found (R. 31), as follows:

> "There were numerous maps introduced as evidence herein, and in the opinion of the Court, having reviewed over the past week end all the numerous maps and documents and all of the exhibits, the basis of all of them, that is almost all of them, is the parent map work and field notes of Mr. M. D. Monsarrat. Monsarrat's plat accompanies Grant 3437." (R. 31)

Appellant's brief largely is devoted to an attack on this map (Br. 26-27, 29, 31-33, 41, 68, 73, 75-76), although the trial court's finding is supported by substantial evidence (R. 248-51, 291-293, 302-305, 312-313, 333). Appellant's attack on the map, and on the findings concerning it, is embroidered upon cross examination (R. 335-339, 345) in which appellant's counsel differentiated between testimony of the witness Newton based on his knowledge of Monsarrat's handwriting and of survey office practice, and personal knowledge based on observation. The witness did not see Monsarrat do his map work and said so (R. 338). At no time did the witness say that the piece of land was mapped after the grant or that the original map was changed in any material respect. The attack on the map and findings concerning it also is embroidered upon testimony that the grant numbers and the name of the owner were printed

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[26] There is no evidence whatsoever that Meyer had Monsarrat write the description, as stated by appellant (Br. 8). It is regular survey practice to map a survey, then write a description from the map. (R. 333)

in after the grants were issued (R. 303-304, 317-318, 320), and that on some maps additions such as pipelines were indicated by special coloring (R. 318, 319-320), the boundary, however, remaining the same (R. 320). The brief contains many incorrect statements which will not be explored further in this regard, in view of the complete agreement of the trial court and Supreme Court on the authenticity and origin of the patent map.

Monsarrat's worksheet is Exhibit 11, a map 1000 feet to the inch. On it were marked in Monsarrat's own handwriting (R. 248) certain points appearing in his field notes as X, K, A, and Y. While it is not necessary to go back of the map appearing on the face of the patent or to go into the field notes, as the Supreme Court held (R. 47), these points were much referred to in the testimony and will prove convenient references. They were plotted by applicant's own surveyor McKeague (Ex. A, R. 68-69, 93, 99) and by the government surveyor Newton (Ex. 10, R. 246). Both agreed as to the location of these points (R. 258-259) and they correspond with Monsarrat's work (R. 262-263, Ex. 11). For convenience, we have marked these points in red on Map II. We also have marked in red on Map II the line of the direct bearing between X and Kaluahauoni Government Triangulation Station; this direct bearing is given in the grant.

Turning now from the survey and map material to the sale itself, the exhibits show that on July 4, 1888 R. W. Meyer wrote the Minister of the Interior stating his discovery of the fact that there was no award of the "lele" of Kahanui (Ex. C-1). The same letter spoke of Monsarrat's survey, referred the Minister of the Interior to Monsarrat,

and made an application for purchase, offering $500. The offer was repeated by a letter of August 31, 1888 (Ex. C-3).

On October 4, 1888 the land was advertised for sale on October 10, 1888, at public auction. In response to the law's requirement that the notice of sale contain "a full description of the land to be sold, as to locality * * *," the notice described it as "the remnant or lele of the Ahupuaa of Kahanui on the Island of Molokai." (Ex. D-1).[27] In response to the law's requirement for a statement of the area the notice stated "an area of say 1000 acres". In response to the law's requirement for a statement of the land's quality the notice stated "mountain forest land". But the required "reference to the survey" was not supplied in the notice and the sale might well have been held invalid for that reason.[28] However the Supreme Court held that this requisite was met, due to the fact that the land actually had been surveyed, and the maps, survey and field notes were a matter of public record (R. 45, 47).[29]

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[27] The land was *not* advertised as the "whole of the remnant or lele of Kahanui" as incorrectly stated by appellant (Br. 9, 44).

[28] *Hawaiian Government v. Cornwell,* 8 Haw. 12, 1890.

[29] Appellant cannot limit the record of the survey to the description sent in by Meyer (Br. 45, 58, 60). The sale was at public auction and governed by the entire public record of the survey, as held by the Supreme Court (R. 45, 47). This is evident from the law's requirement that the survey be kept "open to inspection of anyone who may desire to examine the case." Maps are specifically mentioned in the law as being open for public inspection and reference. Appellant itself regards the field notes as part of the survey (Br. 3, 8, 11, 30, 42, 47-50, 56-57, 61-63, 73, 76-77), and thereby accepts the principle that the record of the survey consists in more than the description.

In any event the whole matter of the survey and the effect of it was fully reviewed by the parties at the time, as shown in the next paragraphs of this brief.

It should be noted that appellant's citation of Exhibit 19 has no bearing, for this simply was an excerpt from Grant 3437 copied some years later. Of course the patent itself (Ex. B) is the best evidence.

A few days after the sale there was issued the patent afterward cancelled (Ex. J). This patent contained the same sketch map appearing in the final patent (Ex. B). The wording of the description was the same as that written by Monsarrat on September 7, 1886 (See Grant 3437 file, Exs. C-1 to C-3).

The next occurrence appears from Monsarrat's letter of February 7, 1889 to Alexander at Honolulu (Ex. 7-C). It there appears that in November, 1888, at Kaunakakai on Molokai, Meyer spoke to Monsarrat and Alexander about a "change in the notes of Kahanui piece that was sold to Mr. Meyer." Of this Monsarrat says in his letter: "That is around the Waihanau and Waialeia gulches." A proposed amendment of the description appears (R. 75) in three lines marked with an asterisk at the bottom of the first page of the October 13, 1888 patent (Ex. J), in the roughing in of the ridge on the map on the second page, and also a correction in names on the second page.

The proposed amendment of the description would have substituted for the language "Thence around the head of the Waihanau and Makanalua Valleys to the Government Survey Station 'Kaluahauoni' ", the language "Thence around the head of the Waihanau Valley following the Pali to Kalawao[30] and around the Waialeia valley to the Gov't. Survey Station Kaluahauoni." This change was not made. However, the valley east of the ridge, appearing in the description and patent when first written as "Makanalua", was corrected to read "Waialeia". (It is agreed that Waialeia

[30] Kalawao lies north and east of the tip of the ridge (See Ex. U). Hence to follow the pali all the way to Kalawao would have included the ridge in Grant 3437. The ridge was conveyed by Grant 3539 (infra).

is the correct name of the valley east of the ridge).

It is significant that the trial court held (R. 33) that the "amended description [which] was attempted to be included * * * did, in fact, not include and did exclude the parcel [of] which the applicant now claims ownership in fee."

As to why the proposed amended description was not adopted we find that on October 17, 1889 (Ex. H) the Minister of the Interior wrote Meyer acknowledging receipt of a letter from him (Ex. G), and saying that "the inaccuracy in spelling of names in said Patent will be corrected in a clean copy issued to you; it now awaits signature of King." The letter continues:

> "With regard to the addition which you claim ought belong to the land, and desire to be included in said Patent, I would say that upon examination of the records, I find the sale was made by a map and detail description both made by Mr. M. D. Monsarrat, excluding the piece which you claim; under these circumstances I cannot lawfully add anything to the area of the land included in this Patent.
>
> Mr. Monsarrat states however that the piece you desire is undoubtedly a part of Kahananui, and he omitted it because he thought it was of so little value that it was not worth while surveying the same.[31]
>
> If you wish to have a survey made of the land I will sell it to you at a private sale[32] at a nominal sum. This of course will involve the cost of another Patent."

About twelve days after this letter, on October 29, 1889, Grant 3437 in its final form (Ex. B) was issued.

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[31] This again shows that the survey was not, and never purported to be, the "whole" of the lele of Kahanui as claimed by appellant.

[32] A private sale was lawful because this piece was valued at less than $300.00.

Replying to the Minister of the Interior's letter, on October 23, 1889 (Ex. I-2), Meyer again referred to the "additional piece of land" which had been the subject of the correspondence, and stated:

> "I must acknowledge the correctness that it would be illegal to add anything to a Royal Patent for a piece of land sold by survey, and never did expect anything of the kind—and I am perfectly willing therefore, to pay for the extra patent and also the nominal value which you see fit to put on in order to obtain the deed for this additional piece of land.
>
> "Regarding the survey of it, I presume and feel confident, that a sufficient description can be made out, from now existing surveys, without the necessity of making out an actual survey, and have a surveyor come up on purpose, which would probably prove to be very expensive.
>
> "Please accept my thanks for having the error in spelling, in the first patent corrected and in having a new and clean copy made out."

From further correspondence (Ex. I-1, P, and O) it appears that the ridge was not surveyed, except as to its length and some points. On June 25, 1890 Monsarrat wrote Meyer:

> ". . . you can make an application as I told you viz: All the land on the top of the ridge between Waihanau and Waialeia valleys and lying between the edge of pali on the East side of Waihanau and West side of Waialeia Valleys. I think this or something similar would do for a description.
>
> I enclose a rough tracing from my 1000 foot map[33] showing the ridge and the points located by me. From which you can get the length of the ridge and get some idea of the area. . . ." (Ex. O)

On May 5, 1891 the patent conveying the ridge was issued, being Grant No. 3539 (Ex. K). It contained a center

[33] This again shows the authorship of the maps.

line description and a map showing the intention to convey land on top of the ridge between Waihanau and Waialeia valleys and lying between the edge of pali on each side. J. F. Brown of the Survey office wrote Meyer (Ex. L) that it had been intended to include in this patent the words "that tract of land lying on the top of the ridge between the Waihanau and Waialeia valleys, and bounded by the upper edge of the palis of these valleys", but in view of the patent's map being so clear to this effect the omission is not important.

The beginning point of Grant 3539 for the ridge piece, "beginning at a point on the northern boundary of Grant 3437", is Point A, one of the points located from Monsarrat's field notes as above stated (supra, p. 15), and marked on Map II. There is no disagreement as to the location of Point A nor as to the fact that "the beginning point of Grant 3539 calls for, in its description, this point A" (R. 88, 93, testimony of appellant's surveyor; and Ex. A being the map and marking of points by appellant's surveyor), nor is there any disagreement as to the fact that Grant 3539 touches Grant 3437 at only this one point, Point A (R. 88-89, 90, testimony of appellant's surveyor).

In making the survey for appellant's application in the Land Court, appellant's surveyor included the ridge in Grant 3437, even though Meyer admitted it was not so included. Appellant's surveyor followed the proposed amended description of Grant 3437 that was not made, as well as a great deal of other material extraneous to the grant (infra, pp. 31-32).

4. The Grant 3437 map is to be read with the description and is a part of the description.

In each patent there is a map drawn on the second page,

intervening between the first and last pages. Thus, in Grant 3437, the first page (numbered 149 in the record book) bears the words of grant and the language of the description, the next page (numbered 150 in the record book) has drawn on it the sketch map made from Monsarrat's map, and the last page (numbered 151 in the record book) states the area, reserves mineral rights, and contains the habendum and testimonium clauses, followed by the signatures of the King and Minister of the Interior (Ex. B). The map thus is "a part of the patent on its face", as stated by the Supreme Court (R. 45).

Appellant assumes that the map is not a part of the description because not specifically referred to in the description (Br. 5, 27). Appellant cites no authorities; the authorities are to the contrary as would be supposed. Thus, in *Murray v. Klinzing*, 64 Conn. 78, 29 Atl. 244, 1894, the question was whether the court erred in treating the map on the deed as a part of the description of the land intended to be conveyed. The plaintiff argued that in the absence of an express reference to the map it was not a part of the description. The court held otherwise, saying:

> "Where a map or a diagram is drawn on a deed in such relation to, or connected with, the words of the deed, as to indicate to any reasonable person that the grantor intended it to be taken as a part of the description, then no reference is needed. It is entirely a question as to what the grantor intended to convey. If the map is on another paper, a reference might be necessary in order to identify it. When the map is on the deed itself, the court, of necessity, must examine it, and from it, taken together with the words of description, determine what the deed conveys."

In *Wailuku Sugar Co. v. Hawaiian Commercial and Sugar Co.*, 13 Haw. 583, 586, 1901, the instrument for construc-

tion was a land commission award. The question was whether the title ran to the center of the stream or only to its bank. The Court held the latter, although the language of the description ran "along" the stream. Applying the rule that a deed will be construed as excluding the bed of the stream if such intent "clearly appears from the language of the conveyance or from any map or plat made a part thereof" the Court held that the intention to exclude the bed of the stream was confirmed beyond doubt by a diagram contained in the Award, it being "over the signatures of the members of the Land Commission and may, therefore, be considered as a part of the Award itself."

The purpose of a reference to a map is to make it "as important a part of the description as if it had been actually copied in the deed."[34] This again shows that insertion of a copy of the map in the deed is the best method.

When a map is made a part of a deed or patent, everything that is shown on the map becomes a part of the description, and where the words of the description are general they are given certainty by the map, which is considered the more particular and controlling description.[35]

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[34] *Werk v. Leland University,* 155 La. 971, 99 So. 716; *Slauson v. Goodrich Transportation Co.,* 99 Wis. 20, 74 N.W. 574; *McBryde Estate v. Gay and Robinson,* 15 Haw. 117, 121, 1903; 2 Devlin on Deeds, Third Ed., Sec. 1020; 2 Thompson on Real Property, Perm. Ed., Sec. 477; 8 Am. Jur. 750, Sec. 8.

[35] *McBryde Estate v. Gay and Robinson,* supra, 15 Haw. 117, 121-122; *Wailuku Sugar Co. v. Hawaiian Commercial and Sugar Co.,* supra, 13 Haw. 583, 586; *Lincoln v. Wilder,* 29 Maine (16 Shep.) 169, 180; *Vance v. Fore,* 24 Cal. 438, 1864; *McIver's Lessee v. Walker,* 9 Cranch (13 U.S.) 173, 1815, 3 L.Ed. 694; *Lotz v. Hurwitz,* 174 La. 638, 141 So. 83, 1932; *Dallum v. Breckenridge,* 6 Fed. Cases No. 3547, C.C.D. Tenn., 1812; *McCormick v. Huse,* 78 Ill. 363, 1875. *Kelekolio v. Onomea,* 29 Haw. 130, cited by appellant (Br. 34), was a case of an irreconcilable conflict between the head of the holua as shown by the map, and an auwai which was called for and was a definite and certain monument; the case is not in point.

We already have dealt with appellant's contention that the map in Grant 3437 is of doubtful origin (supra, pp. 14-15). The remaining argument made against the map is that it is not based on an actual survey along the disputed boundary (Br. 26, 29, 31, 41, 75). We will show in the next division of the argument that the map is sufficient for all practical purposes. That is all that is required.[36]

5. Upon application of the governing rules of law, the boundary is clear, certain and unambiguous, requiring a location that excludes the disputed area.

Grant 3437 commences at the Government Triangulation Station Puu Kaeo "on the edge of the Waikolu Valley." This is the southeast corner of the piece, as shown on the patent's map (See Map I). The boundary then runs west and south along the government land of Kamiloloa to a stone marked as indicated, then north and west along the land of Kaunakakai to a cross on a stone, then continues north and west along the land of Kalamaula to a cross on a stone, then again continues north and west along the land of Kalamaula "to a stone marked with a cross at the edge of Waihanau Valley." All of this boundary was located without dispute. The next call gives rise to the dispute. It reads:

> "Thence around the head of the [named] Valleys to the Govt. Survey Station Kaluahauoni. The direct bearing and distance being S. 79° 07′ E. (true) 8631 ft."

Of the valleys named the first, or western one, is the Waihanau Valley (at the edge of which is the stone marked with a cross to which the previous call carried), and the sec-

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[36] *Arkansas v. Tennessee,* 269 U.S. 152, 156-157, 1925, 46 S.Ct. 31, 70 L.Ed. 206; *Hughes v. City of Carlsbad,* 53 N.M. 150, 203 P. 2d 995, 999, 1949.

ond valley or eastern one is the Waialeia Valley (See Map I).

The last call reads: "Thence along the edge of the Waikolu Valley to initial point." This again has been located without dispute, that is, from the Government Station Kaluahauoni along the edge of Waikolu Valley to the point of beginning.

Returning now to the call "around the head" of the Waihanau and Waialeia Valleys, it further appears by comparison of the map annexed to the appellant's application and the map annexed to the Territory's answer, and from the appellant's Exhibit A prepared by its surveyor, that the parties are in agreement as to the line from Point A to the Government Station Kaluahauoni. (Point A is one of the field note points marked for convenience of reference on Map II, it being undisputed that this point is located at the base of the ridge and also that this is the beginning point of the description of Grant 3539 and the only point at which this grant touches Grant 3437, supra, p. 20. Also, upon comparison of the maps annexed to the appellant's application and the Territory's answer, it appears that the parties have the same location for the line from the northwest tip of the land, that is, from the stone marked with a cross at the edge of the Waihanau Valley, as far as the place indicated by the red line on Map I, where appellant's line takes off north and east and the Territory's line continues south and east along the line shown on the patent map. Thus the call from the stone marked with a cross on the edge of the Waihanau Valley, thence around the head of the Waihanau and Waialeia Valleys to the Government Survey Station Kalua-

hauoni, which is the northern boundary of this piece, is located without dispute as to its extreme western portion and without dispute as to the eastern portion from the base of the ridge marked Point A on Map II to the Government Station Kaluahauoni. As correctly stated by the Supreme Court (R. 42) the issue was narrowed by the parties to the determination of the location of the middle western portion of the northern boundary. The parties stipulated that the issue was simply the boundary of the disputed area of approximately fifty acres delineated in green on the map annexed to the Territory's answer (R. 61).[37]

From the words of the description it appears that the northern boundary meanders along the sinuosities of the edges of the valleys, and the Supreme Court so held (R. 49, 52). This appears from the fact that the line begins at the edge of the Waihanau Valley and proceeds "thence around * * *", ending at the edge of the Waikolu Valley at the Government Station Kaluahauoni. This calls for "the contour lines of continuous mountains meandering along the edges of the respective three adjoining valleys similar to that surrounding the ridge land of Royal Patent 3539" (R. 49); "a meander line commencing with 'a stone marked with a cross at the [western] edge of Waihanau Valley thence [curving along that edge in a southerly direction to the topmost part of the valley's upper end] around the head * * *' " (R. 52, bracket insertions by Supreme Court); "the valley's edge" (R. 52). Further, the call is not "around the head of the Waihanau Valley and around the head of the Waialeia Valley" but instead it is a call "around the head" of the two

[37] Appellant's brief reads as if the stipulation had divorced the issue from the rules of law governing the determination of such an issue (Br. 6, 15, 17, 58). The record speaks for itself.

valleys. From the direct bearing furnished it also appears that the direction of the line from its beginning at the edge of the Waihanau Valley to its end at the edge of the Waiholu Valley at the Government Station Kaluahauoni, is southeast.

The map further defines the intent as to the contour or thread the sinuosities of which are to be followed.[38] Calling the line a "meander line" does not affect the importance of the map. As stated in *Horne v. Smith*[39] in disposing of a contention that the boundary was the water line of the main body of a certain river, as opposed to the contention that the boundary was the water line of a bayou opening into the river:

> "* * * The basis of this contention is the familiar rule that a meander line is not a line of boundary, and that a patent for a tract of land bordering on a river conveys the land, not simply to the meander line, but to the water line, and hence, as claimed in this case, carries it to the water line of the main body of the river. * * *" (p. 42)
>
> "* * * It is * * * true that the meander line is not a line of boundary, but one designed to point out the sinuosities of the bank of the stream, and as a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser. *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Hardin v. Jordan*, 140 U.S. 371, 380. * * *" (p. 43)
>
> "But the question in this case is whether the boundary of these lots is the bayou or the main body of the river. That a water line runs along the course of the meander line cannot, of course, in the face of the plat and survey, be questioned, but that the meander line of the plat is the water line of the bayou rather than that of the main body of the river, is evident * * *.

[38] *Horne v. Smith*, 159 U.S. 40, 42-44, 15 S.Ct. 988, 40 L.Ed. 68; *Wailuku Sugar Co. v. Hawaiian Commercial and Sugar Co.*, supra, 13 Haw. 583, 586; *Lincoln v. Wilder*, supra, 29 Maine (16 Shep.) 169, 180; *Erskine v. Moulton*, 66 Maine 276, 280, 1877.

[39] Cited in the preceding note.

> * * * the meander line, as shown on the plat, is, so far as these lots are concerned, wholly within the east half of sections 23 and 26, while the water line of the main body of the river is a mile or a mile and a quarter west thereof, in sections 22 and 27. * * *" (pp. 43-44)

Hence, appellant does not advance its case by stating that the northern boundary is a meander line and reiterating the rules applicable to meander lines (Br. 21-24, 26-31, 75). A meander line serves the purpose of locating the sinuosities which are to be followed, and that is its purpose in the patent's map.

Upon application of the correct rules we find from the patent as a whole, that is, from the general description by words and the particular description by the map, that the following is to be done in locating the northern boundary:

(1) It starts on the west side of Waihanau Valley at a point to be located by running the preceding boundary, and thus is defined as a stone marked with a cross on the edge of the valley.

(2) From this starting point the boundary meanders along the sinuosities of the edges of the valleys, as stated by the Supreme Court at R. 49, 52, reviewed supra.

(3) The starting point is the northernmost tip of the tract. From thence, the boundary runs in a sloping southeasterly direction to reach the head of the Waialeia Valley, and between this portion of the boundary and the western boundary that adjoins Kalamaula there is formed a thumb-shaped piece, as on the thumb of a right hand. Waihanau Valley is on the east side of this thumb with Waialeia Valley east of that.

(4) From the tip of this thumb (i.e. from the marked stone which is the starting point) to Kaluahauoni Govern-

ment Triangulation Station a direct bearing is given by the description, and if dotted in on the map it will be found that the northern boundary lies south of this direct bearing line, except for the extreme eastern tip of the boundary, not in dispute, where the line after passing along the head of the second valley, Waialeia, turns back along the edge of the third valley, Waikolu.

The conditions on the ground were shown both by the appellant and the Territory without disagreement as to any essential of this location when made under correct rules of law. Reference is made to the maps (appellant's Exs. A and M, the latter being a copy of the map attached to appellant's application), the contour and profile maps (Ct's Ex. 1 and appellant's Ex. N); the testimony of appellant's own surveyor McKeague, as noted infra; the testimony of the Territory's surveyor Newton, surveyor and engineer Towill, and engineers Howell and Jorgensen. Contrary to the statement made by appellant (Br. 4-5, 16-17, 42, 50, 78) these witnesses were on the ground.[40] But in any event there is no disagreement as to the ground conditions described in the delineation of the boundary location which follows. This delineation can be followed from Map II, which will be found to be the same in all essential particulars as the map and testimony of appellant's surveyor McKeague. Topic

[40] Newton made and mapped his survey at the time of the 1936 trial (R. 225, 228, Ex. 10); he retraced Monsarrat's survey on the ground and particularly located on the ground the portion of the boundary here in dispute (R. 227, 253-258). Towill made the aerial photographs and from them the mosaic contour map which is Territory's Exhibit 1 (R. 358) and also was on the ground (R. 376-378). Jorgensen was the engineer who in 1924 put in the water tunnel the intake of which is in the disputed area, and Howell was the engineer who made the further improvements of this water system in 1933; both of them, before doing the work, located the boundary on the ground at the point where the Territory places it (R. 382-384, 389-390; 392-394).

numbering of the below delineation follows that used above in outlining what is called for by the patent.

(1) The starting point of the northern boundary has been located by both parties. It is on the top edge of the Waihanau Valley, on the western side of the valley, at the stone marked with a cross. This is Point X according to Monsarrat's field notes and so designated on Map II.

(2) This top edge of valley can be and accordingly must be followed as it meanders southeast, past the point where appellant drops down 400 feet to the valley floor (R. 144-145; R. 366; Ct's Ex. 1) ; through the point identified as K in Monsarrat's field notes, and so designated on Map II, where this top edge of the valley is about 350 feet above the valley floor[41] (R. 144-146; Ct's Ex. 1) ; and to the point of overlapping spur ridges below described, at which point we are 280 feet above the valley floor (R. 366-367; Ct's Ex. 1) . All the way from the starting point at the marked stone, Point X, this contour has been distinct, as testified by appellant's surveyor McKeague.[42] At the point of overlapping spur ridges below described there is a sharp turn to the west to the point identified as Y in Monsarrat's field notes and so designated on Map II. However, the patent does not call for following a contour that runs west. It calls for a southeastern direction in order to reach the head of the Waialeia Valley. Nor does the patent call for running back to the

[41] The valley floor rises, as shown by appellant's Ex. N.

[42] Appellant's surveyor McKeague, referring to this contour as the top edge of the pali, said that it was distinct through and beyond Point K, and continues on around until it hits Point Y (R. 134, 149; for the points mentioned see Map II). This can be followed from the hachure marks on this surveyor's map, Exs. A and M.

As to the differentiation between the steepness of the pali in different portions, made by McKeague and touched on in appellant's brief, this is discussed, infra, pp. 33-34.

western or Kalamaula boundary of the tract as would be done if we followed the contour west to Point Y, for that would bite right through the thumb which on the contrary is depicted by the patent as attaining a gradually increasing thickness. Accordingly, looking for the contour intended to be followed in the southeastern direction toward the head of Waialeia Valley, we find that at this point there are overlapping spur ridges coming out from each side of the valley and causing an S bend in the stream at a pool called Waiau. Although appellant's surveyor McKeague, did not show on his own map the spur ridge coming down from the east side of the valley he admitted it was there and that there was a marked overlapping of these spur ridges (R. 148-149, 158-159, 162, 165), his testimony being:

"Q. A very marked overlapping. Correct?

A. That is right."

(R. 165)

These overlapping ridges at the S bend of the stream were held by the Supreme Court to mark the head of the valley (R. 51). They block off the view of the valley, and above this point the stream begins to branch out (R. 255-256, 364-366, 377-378, testimony of Newton and Towill; see Map II and appellant's Ex. A). Appellant argues that "the valley involved runs as a water shed several miles above * * *" (Br. 55). But this is not the material question. That the line of the overlapping spur ridges is the head of the valley intended by the patent is all that is material.

The turn around the valley's head cannot be north of this point, because the contour of the valley's edge has been clearly followed running south to this point. That the line has not been located still further south does not aggrieve the appellant.

Crossing over on the line of the overlapping spur ridges, therefore, we reach the point at the base of Grant 3539 which is Point A according to Monsarrat's field notes and so designated on Map II. From this point there juts out the ridge that divides the Waihanau Valley from the Waialeia Valley. The top of this ridge, between the palis that mark the east side of the Waihanau Valley and the west side of the Waialeia Valley, is Grant 3539 which touches Grant 3437 at this one point as above stated.

(3) The boundary as thus located runs in a sloping southeasterly direction to reach the head of the Waialeia Valley, and forms a thumb-shaped piece with Waihanau Valley on the east side of the thumb, all as indicated on the patent map.

(4) From the tip of this thumb to Kaluahauoni Government Triangulation Station the direct bearing, when dotted in as has been done in red on Map II, is the chord of a crescent that is formed by the slope of the thumb, and the boundary thus located lies south of this direct bearing line, except for the extreme eastern tip of the boundary, not disputed, where it turns back along Waikolu Valley. This all is as indicated by the patent's map.

The reason why the appellant's surveyor did not find this clearly located line is because he did not look for it. He rejected the patent's map (R. 117). He concluded that since Monsarrat wrote the description before Meyer made the application to purchase the land the description "was not intended to convey the land that was applied for by Mr. Meyer" (R. 84). It was the objective of appellant's surveyor to follow "the intent of where that boundary should be under the application made by Meyer for the land that was

desired" (R. 83, also R. 71). To that end he examined the correspondence and made inquiries of members of the Meyer family, whom he called "kamaainas"[43] (R. 76-78). He also followed (R. 81) the wording of the proposed amended description (Ex. J) and included the ridge (R. 70-71), even though he knew and admitted that it was granted by Grant 3539 as a separate piece of land (R. 88-90); again his theory was that it was part of what Meyer applied for (R. 88). In short, his whole object was to survey what he thought would have been surveyed if a new survey had been made to conform to Meyer's application, instead of what was surveyed, sold at public auction, and actually patented. It needs no extended citation of authority to show that this was wrong.[44] Hence, the only materiality of his evidence lay in his depiction of conditions on the ground.

That appellant's location of the boundary does not follow the patent may be expected from the foregoing. It is reviewed below with topic numbering following that used above in outlining what is called for by the patent.

(1) Appellant correctly locates the starting point of the northern boundary, on the top edge of the Waihanau Valley on the western side of the valley.

(2) Appellant does not follow the top edge of the valley as it meanders southeast, but instead drops down 400 feet to

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[43] The Territory consistently contended that these persons were not qualfied "kamaainas," but since the entire method by which the appellant located its line is wrong under the governing rules of law the point is not reached; it was not reached by the Supreme Court.

[44] 8 Am. Jur. 819, Sec. 102; *Sullivan v. New Orleans & N.E.R. Co.*, 9 La. App. 162, 119 So. 275, 276, 1928; *Edmonds v. Wery*, 27 Haw. 621, 1923. This particularly was wrong in the case of a public grant such as this one, the rule of construction in such a case being against the grantee. 6 Thompson on Real Property, Perm. Ed., Sec. 3365.

the valley floor (R. 144-145; R. 366; Ct's Ex. 1) just after completing the top of the thumb. From here appellant's line runs north and then crosses the floor of the valley to the ridge, interposing courses not called for, as the Supreme Court held (R. 54). This of course was improper.[45]

(3) By inclusion of the disputed area the thumb becomes a broad chimney with all of Waihanau Valley north of it, for the top of the chimney is supposed to be the head of the valley. Alongside this chimney piece is Waialeia Valley, not Waihanau Valley. But by the patent the Waihanau Valley was shown extending along the side of the thumb. This valley land, which by the patent was to be excluded, now is included in the chimney piece.

(4) When appellant's line is applied, the boundary is made to run north, across the direct bearing line, although (with the exception of the extreme eastern tip near Waikolu Valley where the boundary is not in dispute) it was to lie south of the direct bearing line. The surveyor could not have made a mistake about this. He stood at the northernmost tip of the land, at the marked stone, and took the direct bearing to the Government Triangulation Station Kaluahauoni. He intended the boundary line to meander along to the right, south of this line, and reproduced this intention in the patent, which governs.

Appellant's theory is that the top of a precipice is called for; it further is argued that appellant justifiably dropped down 400 feet to the valley floor because it crossed the valley floor at the top of a big waterfall (Br. 38). However, there is no call for the top of a precipice. This is a play on the Hawaiian word "pali" (Br. 37, 70) but that word is not men-

[45] *Edmonds v. Wery,* supra, 27 Haw. 621, 624, 1923; *Re Waikapu Boundaries,* 31 Haw. 43, 51, 1929.

tioned in the grant either. (It was used at the trial as a convenient way to refer to the top edge of the valleys.) Nor would the word "pali" include a waterfall, which would be "wailele."[45a]

6. The 1891 purchase of the ridge as a separate piece in itself requires rejection of appellant's line.

There is a continuous ridge between Point A, which is the base of the ridge on the south, and the northern end of the ridge called Holae (R. 120-121, 129-130). Grant 3539 was for this ridge piece, described as jutting out from the northern boundary of Grant 3437 and touching it only at the base of the ridge, Point A (supra, p. 20). Meyer purchased the ridge piece in 1891, after agreeing that it was not included in Grant 3437; Meyer obtained the issuance of Grant 3539 to cover it (supra, pp. 17-19). Although Grant 3539 shows on its face that it is for a separate piece, as admitted by appellant's surveyor McKeague (R. 88), it was designated in the appellant's application as "on a portion of Grant 3437" (R. 15). The Territory's answer took issue with this (R. 21). The trial court stated the question ("the question for determination is whether or not Grant 3539 to R. W. Meyer, as a grant, was issued on a portion of Grant 3437 to R. W. Meyer, the same grantee, and in that connection raises the question in dispute as to the boundary of Grant 3437 * * *", R. 28); but the trial court failed to cope with the question so stated. The Supreme Court held (R. 40) that there were "two separate and distinct grants", and gave proper significance to this holding (R. 46-47).

Appellant has not solved, and cannot solve, the dilemma presented by the existence of the second grant. Because it

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[45a] Andrews Hawaiian Dictionary. From "wai" meaning "water" and "lele" meaning "to jump."

could not be solved appellant's surveyor included the ridge in Grant 3437. His theory was (R. 70-71) that he could do this under the proposed amended description (Ex. J), which was not made. The theory of appellant's brief is not clear. Appellant does not state where its line is supposed to proceed after it is pushed across the valley floor at the Big Falls. If the line were then to run south along the ridge to Point A there would be presented a further dilemma. For although part of this area is a hog's back[46] the southern part is a grassy plateau (R. 120). Does the line pass east of this grassy plateau and include it in Grant 3437, on the theory that this part of the line is along the edge of Waialeia Valley? Or does it pass west of this plateau on the theory that this part of the line follows the edge of the Waihanau Valley? If the answer is the latter it is incompatible with the theory that the Waihanau Valley was left behind when the valley floor was crossed at the Big Falls, the supposed head of the Waihanau Valley. If the answer is the first one, then the south part of the ridge was included in Grant 3437; so why does Grant 3539 start at Point A? It is admitted that this is the starting point of Grant 3539 (R. 89, 93). Furthermore, why is Point A the only point at which Grant 3539 touches Grant 3437, if Grant 3539 ran along Grant 3437 (as it would have, had the disputed area been included in Grant 3437); it is admitted that Grant 3539 touched Grant 3437 only at the one point, Point A (R. 88-90). These questions

[46] The sketch map in Grant 3539 does not show this hog's back, as the ridge originally had not been intended to be patented and had not been surveyed, supra, pp. 18-19. (In contrast, the map of Grant 3437, which was surveyed, is remarkably accurate for so large a tract and in such terrain.) As to the map in Grant 3539, it served its purpose by showing the starting point, the relation of the two pieces, and that the second piece was the top of the ridge between the palis.

cannot be answered, and they present insurmountable obstacles to the acceptance of appellant's line. In order to reconcile with Grant 3539, the boundary of Grant 3437 necessarily must stay on the west side of the valley and not hit the ridge until Point A.

7. Parol evidence was not admissible to contradict the patent; this rule excludes from the case the evidence upon which appellant relies.

The well-settled rule[47] was stated by the Supreme Court as follows:

> "The crux of the case concerns the location of a portion of boundary, rather than a construction of the grant, and involves the admissibility of parol or extrinsic evidence. Upon the crucial point this court has authoritatively declared the settled law to be, where, as here, there is no ambiguity, that 'parol evidence is inadmissible to vary or contradict the terms of the grant.' (Ookala S. Co. v. Wilson, 13 Haw. 127, 131.) It further likewise declared that 'It is also settled that parol evidence is admissible when the question is one of location as distinguished from one of construction, that is such evidence is admissible to connect the land with the grant or to apply the grant to the land.' (Ookala S. Co., v. Wilson, supra.) These principles, simply stated, are decisive of the solution of the problem before this court, the objective being to give effect to nothing else but the grant's intention to convey land according to its surveyed description and map."

In another Hawaiian case[48] it was held that there was no ambiguity in the description of land demised, though the description included a statement, "being that portion of the said land suitable for the cultivation of sugar cane", and

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[47] *Ookala Sugar Co. v. Wilson,* 13 Haw. 127, 131, 1900; *Territory v. Kapiolani Estate,* 18 Haw. 394, 396, 1907.

[48] *Notley v. Kukaiau Plantation Co.,* 11 Haw. 525, 529, 1898.

though there were eleven acres of land not suitable for the cultivation of sugar cane divided off from the rest by a high bluff stretching across the entire tract, the court stating the rule as follows:

> "* * * The principle of interpretation is that if there be a description of the property clear and definite, and sufficient to render certain what is intended to be demised, the addition of a wrong name, * * * will have no effect. That there was such a definite and certain description is clear, and it must prevail." (p. 529)

Hence, parol evidence should be taken to "connect the land with the grant", but not to create uncertainty where none exists. This is further developed in the cases, infra.

We have shown that the boundary is located with certainty by the patent itself, which contains its own determination of the Waihanau Valley's head. A surveyor can go out on the ground and locate it from the patent, without asking anyone: "Where is the head of the Waihanau Valley?" The starting point of the northern boundary is located from the preceding call, and if the surveyor stays where he belongs, which is on the top edge of the valley, the proper location unrolls like a carpet. How this is done is the *proper* purpose of the parol evidence. The *improper* purpose, which is appellant's, is to create uncertainty where none exists. It was and is appellant's object to show that the head of the Waihanau Valley is not where it was placed by the government surveyor.

The trial court held that the government survey constituted only an inconclusive opinion as to where the line should be (R. 29-31), and that the question for it to deter-

mine was where the head of the Waihanau Valley should be placed (R. 28-29). This the trial court proceeded to do without paying any attention to the context of the language in the description (which the Supreme Court held called for a line following the valley's edge). The trial court likewise paid no attention to the map (R. 31). Concluding from Meyer's application (without paying any attention to the laws governing public auctions) that the intention of the grantor was to convey "the whole of the lele of Kahanui" (R. 32), the Court decided that such was the governing factor, that the land "was purchased by name" (R. 32), that the ancient boundary of this land was at the big fall in Waihanau Valley, and that this big fall accordingly was the head of Waihanau Valley (R. 33-34). The evidence in this regard, held extraneous and inadmissible by the Supreme Court, is well summed up by it as follows:

> "* * * That evidence consists of the testimony of various witnesses, the correspondence between the patentee and the Minister of the Interior, letters of Monsarrat and other documents. It deals generally with ancient boundaries and specifically with the big waterfalls. It tends to prove, assuming without deciding such probative tendency, that the top of those falls has been considered 'since ancient times' to be the head of the Waihanau Valley as a natural monument descriptive of an ancient boundary and was used and regarded by the patentee for the purpose of marking the middle western portion of the northern boundary of Royal Patent Number 3437." (R. 54-55.)

This is the same evidence now urged upon this court (Br. 3, 7-9, 11-14, 39-40, 46, 55-56, 69, 74, 76-77). As it is extraneous, there is no need to delve into its insubstantial char-

acter or into the appellant's numerous departures from the record in its brief.[49]

The Territory repeatedly objected to this extraneous evidence, pointing out that no uncertainty in the patent had been shown (e.g. R. 170, 173-174, 190). Error duly was assigned by the Territory to the trial court's overruling of such objections (R. 10-12, 44), and the evidence was excluded by the Supreme Court's decision (R. 48, 54-56). The error committed by the trial court in admitting it is very well epitomized in *Territory v. Kapiolani Estate,*[50] in which the court said:

> "* * * But as the only ground for admitting the evidence would be the uncertainty of the surveyed line it would be reversing the rule in such matters to regard the line as uncertain because of the evidence and to admit the evidence to explain the uncertainty produced by it. * * *" (p. 396)

That was a case of a land patent and a boundary description, both following the "Gay survey," which incorporated a map from which it appeared that the boundary, described as "returning on the Eastern Bank of the River," was set well back from, and not intended to follow, the water's edge, as held in an earlier case,[51] the rulings in which were adopted. In the later case (18 Haw. 394) the court held that by reason of this certainty "explanation by extraneous

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[49] For example, Br. 56, where it is stated that "the kamaainas said [to Monsarrat] that the boundary was the head of Waihanau Valley." See also Br. 60. There is no such evidence. According to Monsarrat's letter of July 17, 1885, "the Kamaainas showed me a piece of Kahanui away mauka on the edge of the palis * * *." (Ex. 7-A)

[50] Supra, 18 Haw. 394, 396.

[51] *McBryde Estate v. Gay and Robinson,* supra, 15 Haw. 117, 122, 1903.

evidence" could not be permitted. The evidence thus excluded consisted of an explanation that the boundary was intended to include only the river within the banks and not the marshy fringes, because it was "always understood" by the "native residents" that this particular ili of Kuiloa only included the river and was merely a fishing right. The case is closely in point here.

In requiring that the land be "correctly surveyed" it of course was the purpose of the law to remove uncertainty and to not rely on evidence of ancient boundaries. The uncertainties of that type of evidence would increase year by year as the kamaainas died out, as was recognized. The map therefore was intended "as a final and conclusive reference for the location of the * * * line" and it was error to receive evidence as to the "true location," since this "introduced the uncertainty" which was sought to be avoided.[52]

As stated by the Supreme Court of the United States:[53]

> "The public had the option to declare the true mouth of the river, for the purposes of a survey and sale of the public land."

That was in a case in which there was a call for the mouth of the Chicago River in the field notes and plat of the survey. The Chicago River was the southern boundary. However, instead of following the river in its southerly bend to the natural mouth of the river, the plat showed a straight line, following an artificial channel cut through the sand bar formed by the bend in the river. The court held that the plat could not be contradicted; the only question in the case was whether the land sued for was within that platted, this

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[52] *Wilson v. Chicago Lumber and Timber Co.*, 143 Fed. 705, 712-713 (C.A. 8th 1906).

[53] *Bates v. Illinois Central R. Co.*, 1 Black (66 U.S.) 204, 208, 17 L.Ed. 158, 1861.

question arising by reason of the land presently being under water in consequence of certain piers constructed after the plat was made.

In another case in the Supreme Court of the United States[54] the Court rejected the contention "that because the water mentioned on the plat is called Indian River the boundary must be taken as the water line of the river, and cannot be that of any intermediate bayou." The Court followed the case cited in the preceding note and said:

> "* * * obviously the surveyors surveyed only to this bayou, and called that the river. The plaintiff had no right to challenge the correctness of their action, or claim that the bayou was not Indian River or a proper water line upon which to bound the lots."[55]

8. The rule as to natural monuments does not govern this case.

It is claimed that the Big Falls marked the ancient boundary and was always understood in the Meyer family as being the head of the Waihanau Valley (Br. 11-14). But as already has been shown, the patent furnished its own interpretation of the head of the Waihanau Valley and is not subject to contradiction by the showing of a different one. The case is not one of a natural monument. There was no call for the Big Falls. As to the "head" of the Waihanau Valley, since it is sought to ascertain this by an ancient boundary or place name it is arguing in a circle to say that the case is one controlled by a natural monument. The argument really is that the case is controlled by the ancient boundary or place name. As stated by appellant's counsel in the trial court:

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[54] *Horne v. Smith,* supra, 159 U.S. 40, 45-46.

[55] See also *Givens v. United States Trust Co.,* 260 Ky. 762, 86 S.W. 2d 986, 1935, reviewing several cases holding that the shape of the land as shown by the plat is controlling when it is evident where the surveyor placed objects or other boundary lines called for, even though he was mistaken in so placing them.

> "The question of surveying does not enter into this deal at all and it is not proper cross-examination. How he would determine the head of a valley as described in a grant, when the valley is described by place name, is determined by where the place name ends, not where the physical contours of the land continue up several miles, several miles on up." (R. 136)

This argument permeates appellant's brief (Br. 11-14). In effect, it is an attempt to construe the patent as partly by survey and partly by name. Even the Land Commission, which had authority to make an award either by survey or by name, could not combine these methods.[56]

The correct rule as to natural monuments is that they prevail when more certain because there is less likelihood of a mistake being made as to them, "but where this reason fails the rule itself fails."[57] Thus, in an attempt to bring into the case a definite natural monument, appellant relies on the Big Falls. But there was no call for it, as the Supreme Court held (R. 55).

It is claimed that the Big Falls were the southern boundary of the land of Makanalua, but there is no call for the land of Makanalua. (That word appeared in the description as written on September 7, 1886 (Grant 3437 file, Exs. C-1 to C-3), and in the patent as issued a few days after the sale (Ex. J), as the designation of the second or easterly valley. This was corrected in the final form of the patent (Ex. B) to read "Waialeia.") Therefore, it is not necessary to consider whether a call for the land of Makanalua would have brought into the case the Pease survey, and if so whether the mention by Pease of "a certain mountain peak at the

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[56] *Boundaries of Kewalo,* 3 Haw. 9, 16, 1886.
[57] *Ookala Sugar Co. v. Wilson,* supra, 13 Haw. 127, 132.

head of said gulch called 'Kaulahuki' " could be transformed by the appellant into a waterfall called Kaulahuki (see Br. 13-14, 39, 74). As shown by the patent on its face, and conceded by appellant (Br. 14), Kaulahuki was the name of a government triangulation station considerably south of the grant. The name was so used by Monsarrat in all his work in connection with this survey (R. 278).

Appellant further attempts to bring the Big Falls into the case by resort to Monsarrat's field notes, Exhibit 16 (Br. 3, 8, 11, 30, 42, 47-50, 56-57, 61-63, 73, 76-77). These were part of the public record, so held by the Supreme Court (R. 47), and resort could be had to them if necessary. However, the patent is clear without them. So far we merely have used four of these field note points (X, K, A, and Y) for convenience of reference to points on Map II.

Before taking up appellant's argument in detail, we wish to state that the field notes reconcile with the patent and with the government registered maps, and further confirm the Territory's location of the line. The field notes do *not* take the boundary through the Big Falls. On Exhibit 11 Monsarrat has marked in his own handwriting (R. 248) Points X, K, A, and Y, showing the boundary as running through X, K, and A. Appellant's surveyor McKeague plotted Point K (R. 99) as well as the other points (R. 68-69, 93); he placed them the same as on Monsarrat's map and all the surveyors are in agreement as to the location of these points (R. 258-259, 262-263). That the boundary runs from X to A *through Point K* (shown on Map II) again definitely requires the rejection of appellant's line and again confirms the Territory's line. The Supreme Court so held (R. 53).

Appellant's long and abstruse argument as to the field notes consists in an attempt to connect the word "waterfall" appearing on the sketch on page 112 of Field Book 2 (Ex. 16) with the Big Falls at which appellant wants the line to cross. Appellant admits that "the testimony would have been overwhelming for the appellee if these falls were Waiau" (Br. 49). But appellant argues that it should be deduced that the word "waterfall" on page 112 of the field book refers to the Big Falls because elsewhere in the field notes Monsarrat took two sights to the Big Falls, one from Kaohu Triangulation Station (Ex. 16, page 109, R. 346), and one from Point Z[58] (Ex. 16, p. 111, R. 346). Kaohu Triangulation Station and Point Z are points on the boundary of Kahanui 1, north of this tract. (Ex. A, map by appellant's surveyor McKeague.)

The word "waterfall" on page 112 is in the immediate vicinity of Point A, the base of the ridge, and therefore *not* the Big Falls but instead Waiau Falls,[59] as testified by Newton (R. 311). The straight lines on page 112 from Z to X, and from X to Kaluahauoni Triangulation Station, obviously are not a boundary line, because they cross the heads of the valleys, which are indicated on the field book page by rows of short parallel dashes, the same as used for that purpose on the work sheet map made by Monsarrat (Ex. 11). These straight lines Z to X and X to Kaluahauoni Triangulation Station merely indicate the taking of direct bearings between these points (R. 330), which in fact was done (p. 111 of the field book, Ex. 16).

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[58] Mistakenly referred to by appellant (Br. 50) as Point Y.

[59] These are the falls at the S bend in the stream where the spur ridges overlap near Point A (marked in pencil on Ex. A and see Ex. N).

But even if appellant were given the latitude desired by it in the interpretation of the sketch on page 112 of the field book (Ex. 16) *the boundary could not run through the Big Falls.* When run through the Big Falls the boundary must come out on the ridge at Monsarrat's point "dry tree" as shown on appellant's Exhibit A, the map prepared by appellant's surveyor McKeague. The point "dry tree" plainly appears on the ridge on Monsarrat's sketch in the field book, and the straight line that appellant wants to convert into a boundary line goes nowhere near it.

The real importance of the field book sketch is that, by the rows of short parallel dashes, the sketch depicts the head of each valley with the ridge lying between them jutting out from Point A, and with "Waihanau Gulch" written in and shown as bordering the complete ridge, all the way.

Since the field notes reconcile with the patent and with the government registered maps, it is not necessary to determine which would prevail if the field notes did not reconcile. The trial court did not hold there was any conflict; instead it rejected the work of the government surveyor as only his opinion (R. 29-31).

9. Appellant's claims of "possession" play no part in the case.

Since there is in this case no issue of adverse possession, appellant's claims in this regard (Br. 10) need not be examined.[60] However, it is noteworthy that Albert Meyer, a member of the Meyer family, showed Jorgensen where the boundary went when Jorgensen went on the land to put in the water tunnel in 1924, and the place so pointed out was 1,000 to 1,500 feet above where the intake was put

[60] *In the Matter of the Boundaries of Pulehunui,* supra, 4 Haw. 239, 255, 1879.

(R. 382-383), hence did not include the disputed area. William Meyer, another member of the Meyer family, showed Carson and Samuel Wilder King the boundary when they went on the land to make an appraisal for the 1929 condemnation suit, the map of which followed the patent map (R. 411-413). This William Meyer showed them that the boundary crossed at a place called Waiau, where there was a pool, the place being marked by the witness Carson on Exhibit 21 (R. 354, 355, and see 379), and being the place where the government places the line.

The line always has been placed by the government where it is placed by it today and the government always has claimed the disputed area (supra, note 8). One has only to look at the government registered maps (Exs. 11-15) to see that this is so.[61] There is not one word of evidence that the Territory negotiated for the purchase of the disputed area, as implied by appellant (Br. 10). The 1929 condemnation suit (Br. 11) did not include the disputed area (R. 411-413).

When the government constructed and improved the water tunnel and intake in reliance on its title (both engineers having checked the boundary, Jorgensen with Albert Meyer's assistance in 1924, R. 382-383, and Howell in 1933, R. 392-394), there were no protests or claims of private ownership (R. 383-384, 390, 394).

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[61] As to the lepers not being allowed to go beyond the Big Falls where appellant wants the line to cross, obviously the officials of the leper settlement had no authority to speak for the government as to where the line was and did not purport to do so when they decided how far up the valley the lepers might wander. (The leper settlement is situated on a peninsula far below the mountain area here involved, as shown on Ex. U.) The exhibit cited by appellant (Br. 9) was an affidavit admitted over objections (R. 86, 193-194) and clearly inadmissible.

10. The Supreme Court did not "retry the facts."

Appellant argues that the Supreme Court did not confine itself to issues of law and that it retried issues of fact. (Br. 5, 54-55, 58-59, 73). This is incorrect.

The rule applicable is the familiar one that the appellate court shall not reverse the trial court for any finding depending upon the credibility of witnesses or the weight of the evidence.[62] This of course leaves to the appellate court the materiality of the evidence in point of law. Appellant's case, and the trial court's decision upholding it, were based upon extraneous and inadmissible evidence, the Supreme Court held (R. 43-44, 48, 54-56).

The practice in the Land Court conforms to that in probate, and the proceeding is in the nature of a suit in equity.[63] The court is one of limited jurisdiction having power only to determine whether an applicant has sustained his claim of title.[64] Whether there is, in a Land Court proceeding, an issue of fact requiring trial as such is a question of law for the courts, whose prerogative it is to determine the probative tendency of the evidence and the conclusiveness of the record against the proponent of the issue.[65]

There is in this record no issue of fact that is not concluded by the Supreme Court's rulings of law. The Supreme

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[62] Sec. 9564, c. 186, Revised Laws of Hawaii 1945. Appellant says (Br. 59) that writs of error to the land court are different from writs of error in other cases but this is not correct. Section 12635, which appears in chapter 307 relating to the land court, merely provides that a writ of error will lie, leaving it to chapter 186, relating to writs of error, to supply the provisions relating thereto. The applicability of chapter 186 to land court cases appears from the first section of the chapter and from *In re Kakaako,* 30 Haw. 494, 1928.

[63] Section 12600, Revised Laws of Hawaii 1945; *In re Atcherley,* 24 Haw. 507, 1918.

[64] *In re Rosenbledt,* 24 Haw. 298, 1918.

[65] *In re Kakaako,* supra, 30 Haw. 666, 671, 1928.

Court so held. This has been shown step by step in this brief. In summary:

(1) The land was sold at public auction by survey.

(2) The survey was made by M. D. Monsarrat, government surveyor, in 1885, who mapped the land in 1886 and wrote a description of it dated September 7, 1886. Monsarrat's field notes and maps are on file.

(3) The auction sale was held on October 4, 1888, and a few days afterward there was issued the patent afterward cancelled (Ex. J) containing the same sketch map appearing in the final patent.

(4) In November 1888, Meyer talked to Monsarrat and to Surveyor General Alexander about a change in the description. Meyer wanted the ridge piece included, but the Minister of the Interior decided it could not be included because the sale had been made at public auction. The Minister of the Interior offered to sell Meyer the ridge piece at private sale, it being deemed of a value below the amount at which a public auction would have been required. Meyer acknowledged that nothing could be added to the patent for the piece already sold, and stated his willingness to pay for the ridge piece. The patent for the piece already sold was issued and accepted after the making of minor corrections (mostly in spelling) ; and the same became Grant 3437, issued October 29, 1889.

(5) After further correspondence the ridge piece was sold to Meyer and patented as Grant 3539, issued May 5, 1891. It called for a piece jutting out from the northern boundary of Grant 3437 and touching it only at the base of the ridge, Point A. This point has been located by both parties without disagreement.

(6) In making the survey for appellant's application in the Land Court, appellant's surveyor included the ridge in Grant 3437, even though Meyer admitted it was not so included and purchased it as Grant 3539. The theory of appellant's application was and is that Grant 3539 was "on a portion of Grant 3437," whereas in point of law these were two separate and distinct

grants. Appellant cannot reconcile the two grants. Thus is presented an insurmountable obstacle to the establishment of the Grant 3437 northern boundary where appellant places it. Only by locating the boundary where the government places it can the two grants be reconciled.

(7) The line always has been placed by the government where it is placed by it today and the government always has claimed the disputed area.

(8) The correct rule of law is that the map in Grant 3437 is a part of the description. The map gives certainty to the words of the description, and is to be considered the more particular and controlling description.

(9) The patent itself locates the head of the Waihanau Valley with certainty, and the appellant had no right to adduce evidence that this was not the true location of the head of the valley. Such evidence introduced the very uncertainty which was sought to be avoided by the making of the sale by survey. The sale was not by name. "As the only ground for admitting the evidence would be the uncertainty of the surveyed line it would be reversing the rule in such matters to regard the line as uncertain because of the evidence and to admit the evidence to explain the uncertainty produced by it."

(10) The northern boundary, as fixed by the patent, is a boundary meandering along the edges of the valleys in a southeasterly direction. From the starting point of this boundary on the western side of the Waihanau Valley on its top edge, the line follows the same top edge south as far as it continues in the indicated direction and until it turns sharply west, then follows the line of overlapping spur ridges southeast to turn around the valley's head and connect with the head of the Waialeia Valley at Point A, the base of the ridge which divides the two valleys.

(11) The conditions on the ground were shown both by the appellant and the Territory without disagreement as to any essential of this location when made under correct rules of law.

(12) No other location conforms with the description and map in the patent.

(13) Appellant's surveyor did not find the correct line because he did not look for it. He did not retrace Monsarrat's survey. His objective was to follow "the intent of where that boundary should be under the application made by Meyer for the land that was desired," having in mind that Monsarrat wrote the description before Meyer made the application to purchase and the description "was not intended to convey the land that was applied for by Mr. Meyer."

(14) The rule as to natural monuments does not govern this case. The rule is attempted to be used to contradict the patent's location of the head of the Waihanau Valley and ascertain the line by an ancient boundary or place name, instead of by the surveyor's location of it expressed in the patent. In effect it is an attempt to construe the grant as one made by name, or partly by survey and partly by name.

(15) There was no call for the Big Falls or Kaulahuki. The "Kaulahuki" mentioned in the patent is a government triangulation station considerably south of the grant, as appellant concedes.

(16) The trial court did not find any conflict between the field notes and the patent. The Supreme Court's holding that they reconcile is the only conclusion that could be reached. Even if the appellant were given the latitude desired by it in the interpretation of the sketch on page 112 of the field book the boundary could not run through the Big Falls.

(17) The grant is clear, certain and unambiguous, requiring a location which excludes the disputed area.

The application was filed by appellant and was required to be sustained by it. Since the application was not sustained as to the disputed area, a severance of this area was in order.[66] The Supreme Court had power on reversal to direct modification of the decree[67] as was done (R. 57). "On

[66] Section 12617, Revised Laws of Hawaii 1945.
[67] Section 9564, Revised Laws of Hawaii 1945.

error * * * the entire record is brought up, and the judgment of the appellate court is such as the facts and law warrant as shown by the entire case."[68] The case comes within the rule that when the record conclusively shows what judgment ought to have been given under the appellate court's rulings on the law, the appellate court may direct such judgment.[69]

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[68] *Territory v. Cotton Bros.,* 17 Haw. 374, 378-379, 1906.

[69] *Santa Fe County v. Coler,* 215 U.S. 296, 306, 1909; *Irvine v. Angus,* 93 Fed. 629, 94 Fed. 959 (C.A. 9th 1899), cert. den. 175 U.S. 725 (on writ of error to a federal circuit court which held that plaintiff was not a trustee for one Fair and therefore could not recover advances made for assessments on Fair's stock, Court of Appeals held that there was also involved a count for money paid for Fair's use and benefit, and that it itself would determine from the admitted facts whether plaintiff was a mere volunteer in paying the assessments and also when there occurred such an implied promise by Fair to pay as would start the running of the statute of limitations—these issues having been resolved in favor of the plaintiff the Court of Appeals reversed the judgment for the defendant and directed that judgment be entered for the plaintiff); *Fellman v. Royal Insurance Co.,* 184 Fed. 577 (C.A. 5th 1911) (where "there was no substantial dispute about the actual facts" the Court held that its rulings on the law required judgment for the plaintiff instead of for the defendant and so directed); *Hazeltine Research, Inc. v. General Motors,* 170 F. 2d 6, 10 (C.A. 6th 1948); *Sbicca-Del Mac v. Milius Show Co.,* 145 F. 2d 389, 400 (C.A. 8th 1944); *McDade v. Caplis,* 154 La. 1019, 158 La. 489, 98 So. 625, 104 So. 218, 1923-1925 (suit alleging ownership of a lake of 100 acres, wherein trial court sustained the plaintiffs but appellate court held that 17.96 acres of land reclaimed from the lake had been transferred to one Smith—the 17.96 acres were ordered excluded and since there was no definite description of the area so excluded the trial court upon remand properly determined this upon a rule to show cause); *Bledsoe v. Doe,* 4 How. (Miss.) 13, 1839 (plaintiff in ejectment recovered, but on writ of error appellate court held that defendant's adverse possession required denial of the writ as to part of the land and ordered trial court to limit writ of possession to the remainder); *Dormer v. Dreith,* 145 Neb. 742, 18 N.W. 2d 94, 1945 (plaintiff sued to establish road easement by adverse user and prevailed, but appellate court held evidence did not justify granting an easement over twenty feet in width and limited the decree to this width); *Gray v. Cosden,* 141 Okla. 183, 284 Pac. 288, 1930 (action for conversion in which trial court's judgment was reduced to the amount supported

(Note continued next page)

CONCLUSION

The appeal should be dismissed, or alternatively the judgment of the Supreme Court of Hawaii should be affirmed for failure of the appellant to show error therein (i.e., "manifest" error, "clear departure from ordinary legal principles.")

Dated at Honolulu, T. H., this 7th day of July, 1953.

Respectfully submitted,

RHODA V. LEWIS,
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Territory of Hawaii,
Attorney for Appellee.

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[69] (Continued)

by competent evidence, after the appellate court had held certain evidence was incompetent); *Socony-Vacuum Oil Co. v. Lambert,* 180 S.W. 2d 456 (Tex. Civ. App.), 1944 (seaman's action for damages for personal injuries based on theory ship was sunk by a torpedo, and for care and maintenance—verdict and judgment for plaintiff held unsupported by any competent evidence as to the firing of the torpedo, on which the damages for personal injury depended, and judgment reduced to the amount for care and maintenance); *Colin v. De Coursey Cream Co.,* 162 Kan. 683, 178 P. 2d 690, 1947 (action for personal injuries in which the verdict included $1,760 for medical expenses but the appellate court found the evidence supported only $576 and reduced the judgment accordingly); *Hink v. Sherman,* 164 Mich. 352, 129 N.W. 732, 1911 (where jury found for plaintiff but there was "no substantive proof of any actual damages," judgment reduced to statutory minimum).